In the Supreme Court of the United States

No. 352.

OCTOBER TERM, 1950.

THE TIMKEN ROLLER BEARING COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR POSTPONEMENT OF ORAL ARGUMENT TO OCTOBER TERM, 1951.

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Counsel for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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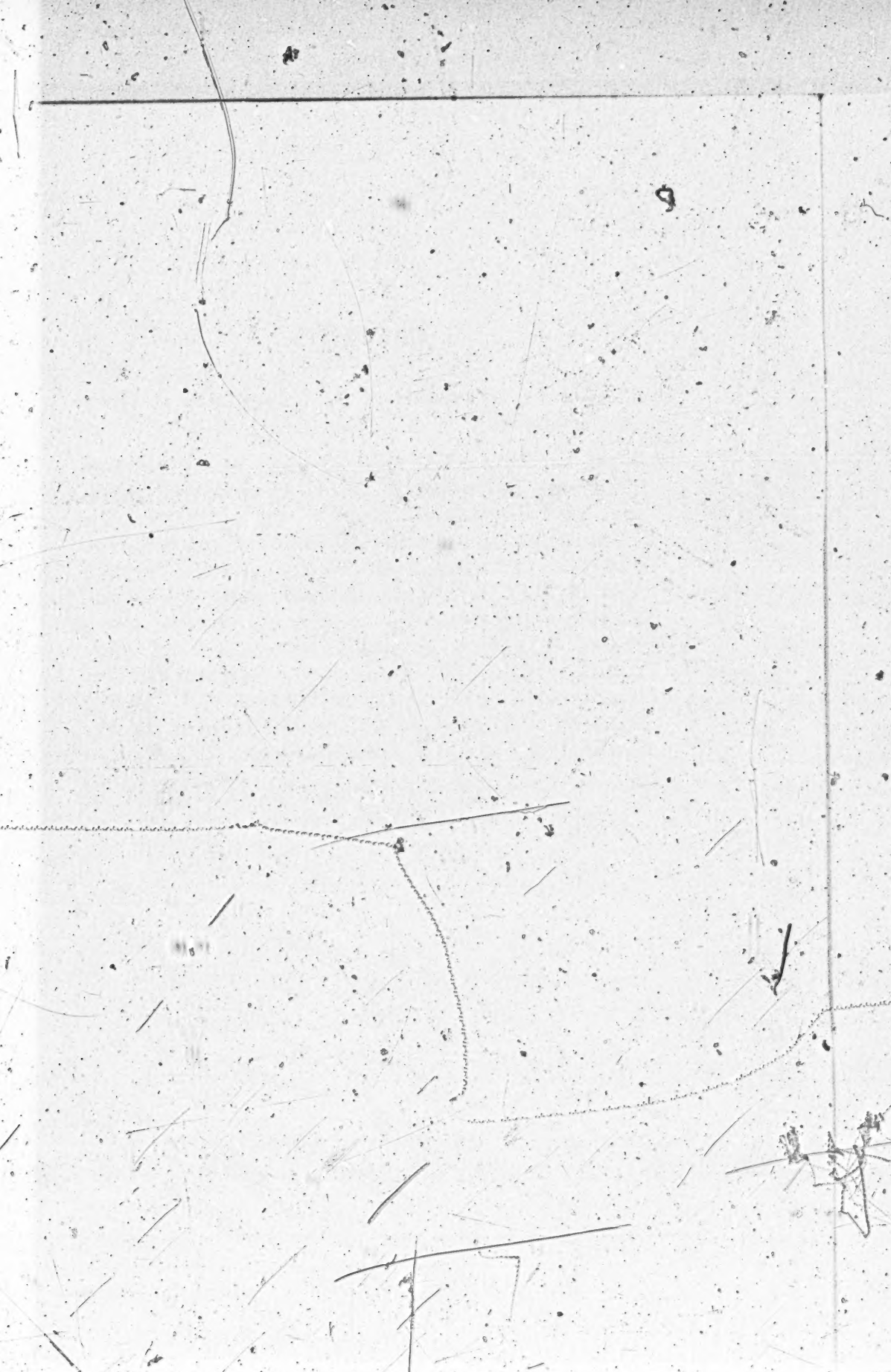

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No. 352.

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THE TIMKEN ROLLER BEARING COMPANY,
Appellant,

vs.

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MOTION FOR POSTPONEMENT OF ORAL ARGUMENT TO OCTOBER TERM, 1951.

The Timken Roller Bearing Company, appellant in the above entitled case, respectfully moves this Honorable Court that the oral argument herein be postponed until the October, 1951, term of this Court, and in support of its motion states:

1. The above-entitled case is now pending on the docket of this Court, petition for appeal having been filed and allowed by the District Court on July 28, 1950 and probable jurisdiction having been noted by this Court on November 6, 1950.

2. Subsequently to the perfection of the appeal to this Court and the noting of probable jurisdiction therein, Michael B. U. Dewar, who in 1927 acquired jointly with the appellant all the stock of British Timken, Limited, an English corporation (hereinafter called "British Timken"), and who in 1928 jointly with the appellant caused Societe Anonyme Francaise Timken, a French corporation (hereinafter called "French Timken"), to be organized died on December 21, 1950.

3. One of the appellant's principal contentions in the above-entitled case in the District Court was that it had not combined unlawfully in restraint of trade and in violation of Section 1 of the Sherman Act (26 Stat. 209, as amended), with British Timken and French Timken, as alleged by the appellee, because it had engaged with Dewar in a joint enterprise (terminated by his death) to conduct the manufacture and sale of antifriction bearings in foreign countries under a license of the trade-mark "Timken"; that British Timken and French Timken, respectively, were acquired and organized as instrumentalities for the purpose of carrying out the enterprise, and that any restraints of trade resulting from agreements between the appellant and these two companies were reasonably ancillary to the organization and conduct of the joint enterprise, all as more particularly described in a motion filed in the District Court after Dewar's death, a copy of which is attached hereto and marked Exhibit A and which is more particularly referred to hereinafter.

4. Pursuant to agreements entered into by the appellant with Dewar in connection with the joint enterprise between them, the appellant was given options effective at Dewar's death to purchase Dewar's ordinary shares of stock of British Timken amounting to approximately 23.74 per cent of all of its issued and outstanding ordinary shares, which, together with the appellant's ordinary shares of stock in British Timken amounting to 30.26 per cent thereof, represent voting control of British Timken, and to purchase stock of French Timken owned by a holding company owned by Dewar representing one vote at stockholders' meetings thereof which, with appellant's stock in French Timken amounting to 50 per cent thereof, represents voting control of French Timken, and also was given the first refusal on the remaining 50 per cent of the stock of French Timken, owned by Dewar's holding company, in the event that Dewar's holding company should desire to sell, all as more

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particularly described in Exhibit A hereto. The appellant has exercised its options as to Dewar's stock in British Timken and in French Timken representing voting control thereof, and has been advised by Dewar's executors that Dewar's holding company desires to sell the balance of the stock of French Timken held by it, and the appellant has advised them that it desires to acquire such balance of French Timken stock. As a result of such acquisition the appellant will become the sole owner of French Timken.

5. On January 24, 1951, the appellant filed a motion, a copy of which is Exhibit A hereto, in the District Court for the Northern District of Ohio, Eastern Division (in which judgment had been rendered against the appellant in the above-entitled case) asking that that court make application to this Court for leave to take and consider evidence of Dewar's death, of appellant's desire to exercise, and exercise of, the options with respect to Dewar's stock in British Timken and the stock of Dewar's holding company in French Timken, and such other evidence deemed relevant by the District Court as the appellant might desire to introduce at the hearing, and to reconsider its judgment herein, and that, upon granting of such application by this Court, the District Court take and consider the additional evidence, thereafter make further application to this Court to remit to it the record to the extent deemed necessary by the District Court for its consideration of the matter, and vacate or modify its judgment in view of the changed circumstances resulting from Dewar's death, all as more particularly set forth in Exhibit A hereto.

6. On February 14, 1951, the District Court heard oral argument on the motion and took it under advisement, and stated to counsel that the Court desired to give the matter careful consideration, to examine the briefs filed by both parties, and an opportunity to study the case, that the Court would be unable to begin the consideration of this matter for 30 days or more from and after February 14,

1951, and that it would be a number of weeks after February 14, 1951, before the Court would reach a decision on the appellant's motion, all as more particularly set forth in a portion of the transcript of the proceedings had with respect to said oral argument, a copy of which is attached hereto and marked Exhibit B.

7. The appellant is advised by the office of the Clerk of this Court that the last assignment of cases for oral argument in the October term, 1950, of this Court will commence on April 16, 1951.

8. It will be impracticable for the appellant to prepare and print a brief on the merits of the above-entitled case after the earliest date on which decision of such motion by the District Court reasonably may be expected and within 3 weeks prior to oral argument of this case on appeal during the period commencing April 16, 1951.

9. If argument is not now postponed it will be necessary to commence forthwith the preparation of a brief in this Court and it is not practicable to undertake, nor is it reasonable to require, the preparation of a brief until the District Court has ruled on the motion, pending disposition thereof, and until any necessary action pursuant to such ruling has been taken, because until such time neither party will know: (1) what facts ultimately will be included in the record before this Court (we are advised by the office of the Clerk of this Court that the printing of the record should be finished by February 28, 1951, but the record, as so printed, will not include any of the facts as to Dewar's death and action taken pursuant thereto, as previously stated herein); (2) what modification, if any, will be made in the findings of facts or conclusions of law of the District Court; and (3) what modification, if any, will be made in the final judgment of the District Court.

10. If the District Court grants the appellant's motion, further time will elapse before the District Court will

be able to request authority from this Court to receive the additional evidence and for the District Court to hear such additional evidence and to reconsider its prior judgment herein; and in such event the appellant would be put to unnecessary expense in the preparation and printing of its brief on the proposed merits of this case in this Court, in that the brief might become unnecessary or inapplicable if the District Court should vacate or modify its judgment.

11. Giving the District Court an opportunity to hear additional testimony in this case based upon the changed circumstances resulting from the death of Dewar, and the opportunity to reconsider its final judgment, will save the time of this Court, by causing to be presented to this Court at one time, with the existing record, any new and additional facts sought to be elicited by the appellant, and will avoid delay in a final determination of this case by this Court.

LUTHER DAY,
1759 Union Commerce Bldg.,
Cleveland, Ohio;

JOHN G. KETTERER,
First National Bank Bldg.,
Canton, Ohio,
Counsel for Appellant.

EXHIBIT A.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

CIVIL ACTION No. 24,214.

UNITED STATES OF AMERICA,
Plaintiff,

VS.

THE TIMKEN ROLLER BEARING COMPANY,
Defendant.

MOTION BY THE TIMKEN ROLLER BEARING COMPANY, DEFENDANT IN THIS COURT, APPELLANT IN THE SUPREME COURT OF THE UNITED STATES, THAT THIS COURT ASK LEAVE OF THE SUPREME COURT OF THE UNITED STATES TO CONSIDER DEFENDANT'S MOTION THAT THIS COURT RECEIVE ADDITIONAL EVIDENCE AND RECONSIDER ITS FINAL JUDGMENT HEREIN AND, IF LEAVE BE GRANTED, THAT THIS COURT PROCEED SO TO DO, BECAUSE OF CHANGED CIRCUMSTANCES DUE TO THE DEATH OF MICHAEL B. U. DEWAR SINCE THE PERFECTION OF AN APPEAL HEREIN TO THE SUPREME COURT OF THE UNITED STATES.

NOW PENDING ON APPEAL IN THE SUPREME COURT OF THE UNITED STATES.

The Timken Roller Bearing Company, defendant in this Court, appellant in the Supreme Court of the United States (hereinafter styled "the defendant"), in support of its motion that this Court ask leave of the Supreme Court of the United States to consider defendant's motion that this Court receive additional evidence and reconsider its final judgment herein and, if leave be granted, that this

Court proceed so to do, because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of an appeal herein to the Supreme Court of the United States, respectfully shows to the Court as follows:

1. Michael B. U. Dewar died in England on December 21, 1950 at the age of 64. He and his acts and agreements with the defendant and others figure prominently and are mentioned frequently in the record, and in the memorandum opinion of this Court in this cause, which was tried throughout and decided upon the basis that Dewar was alive.

2. The final judgment in this cause was appealed to the Supreme Court of the United States on the 28th day of July, 1950, and is now pending on appeal in that Court, being cause No. 352 therein. The appeal was perfected before Dewar died.

3. At the time Dewar died, to wit, on December 21, 1950, he owned approximately 23.74 per cent, consisting of 94,960 ordinary shares, of the issued and outstanding stock of British Timken, Ltd. (hereinafter called "British Timken"), a British corporation engaged in the manufacture of anti-friction bearings, all of the stock of which was acquired jointly by Dewar and the defendant in 1927. At the time of Dewar's death, and at the present time, the defendant owned, and owns, approximately 30.26 per cent, consisting of 121,040 ordinary shares, of the stock thereof. The above described ordinary shares owned by the defendant and by Dewar's estate constitute approximately 54 per cent of the ordinary shares of stock of British Timken, the vote of which is entitled to control its affairs in the absence of default by it with respect to its preferred stock requirements. At the time Dewar died, and at the present time, there was, and is, in full force and effect an agreement between him and the defendant made March 22, 1948 (the latest of a series of agreements which carried out the fundamental agreement to the same effect made in 1927),

by virtue of which the defendant now has the option to purchase all or any of the 94,960 ordinary shares in British Timken belonging to Dewar, exercisable at any time during a period of six months from and after Dewar's death by notice in writing served upon the holders of such 94,960 ordinary shares within the period of six months during which the option is exercisable, at a price agreed upon by the parties, or, failing agreement, at the average price of similar shares of British Timken on the London Stock Exchange over a period of thirty days immediately preceding the date on which the option became exercisable, namely, Dewar's death on December 21, 1950.

4. At the time Dewar died on December 21, 1950, and at the present time, the defendant owned, and now owns, 50 per cent, consisting of 40,000, and La Reunion Industrielle Societe Anonyme (hereinafter called the Lux Company, a company incorporated in Luxembourg, all of the shares of which have been owned directly or indirectly by Dewar) owned, and now owns, the other 50 per cent, consisting of 40,000, of the issued and outstanding ordinary 100 franc par shares of the stock of Societe Anonyme Francaise Timken (hereinafter called "French Timken"), a French corporation engaged in the manufacture and sale of antifriction bearings in France, which was organized at the joint instance of the defendant and Dewar in 1928 and has been jointly owned by them, or corporations owned by them, at all times thereafter. The votes of the above described ordinary shares of French Timken are entitled to control its affairs. The defendant and the Lux Company each own, also, 50 per cent of the issued and outstanding preferred stock and promissory notes of French Timken. By the terms of Section 5 (h) of an agreement entered into on or about the 11th day of December, 1935, by and between the defendant, the Lux Company, Frederick John Pascoe (as trustee) and Dewar, it is provided that, upon the death of Dewar, the Lux Company, if so requested by

the defendant, will cause one share or other holding of shares in French Timken carrying one vote, to be transferred to the defendant or its nominees at the par value of such share or holding, thus transferring voting control of French Timken to the defendant, and it is further provided, in Section 6, that no share of French Timken owned or controlled by the defendant or the Lux Company at the date of said agreement will be sold, transferred or otherwise disposed of unless it has been first offered for sale to the other party by notice in writing, the offer to remain open for acceptance by the party to whom it is made for ninety days after it is received by such party.

5. The defendant acquired 52½ per cent and Dewar 47½ per cent of the capital stock of British Timken in 1927, and the defendant and Dewar caused French Timken to be organized and each acquired, directly or indirectly, half of its ordinary shares, as above set forth, pursuant to a general arrangement in the nature of a joint venture between them by which, in substance, Dewar was to have control of the ordinary affairs of British Timken and French Timken during his lifetime and active participation in the management thereof while those companies made specified profits, and the defendant had the right to acquire complete control of each company in certain events, including Dewar's death, as aforesaid. This arrangement has continued from its inception in 1927 until the date hereof.

6. The defendant intends and proposes, as soon as may be practicable, to exercise its rights under the six months option granted to it by the terms of the aforesaid agreement relating to British Timken stock, and under the option to acquire voting control of French Timken granted to it by the terms of the aforesaid agreement relating to French Timken stock, and proposes to consider the purchase of the remainder of the stock of French Timken, if the same should be offered to it by the Lux Company for ninety days pursuant to the latter agreement. The defendant considers

that it is free so to do without violating any of the provisions of this Court's final judgment in this cause, by virtue of its order entered July 28, 1950 allowing an appeal to the Supreme Court of the United States and staying the execution of said judgment pending the final disposition of said appeal, which order provides as to such stay that:

> "* * * the execution against the above named defendant of all of the provisions of the Final Judgment entered herein, and compliance by the defendant with said Final Judgment be, and the same are, hereby suspended and stayed pending the hearing and final determination of this cause upon appeal."

7. Inasmuch as the time within which the defendant may give the required notices of its intention to exercise its respective options above described is limited as above set forth, it is imperative that it proceed with dispatch so to do for the reason that, if said options are not exercised by it within the times limited, and the final judgment of this Court is reversed or modified by the Supreme Court of the United States, and it is ultimately determined that the defendant may lawfully exercise said options and acquire the stocks covered thereby, it may sustain great and irreparable loss, in that the stock of either or both of British and French Timken, respectively, including the element of control incident thereto, may be sold to purchasers other than the defendant.

8. If the defendant exercises its option, hereinbefore described in paragraph 3, to acquire Dewar's ordinary shares in British Timken, it will be the owner of 216,000 ordinary shares of the stock of British Timken out of a total of 400,000 shares, and will be a majority and controlling shareholder of said corporation with the ensuing and attendant rights to exercise all of the powers vested in it as such.

9. If the defendant exercises its option, hereinbefore described in paragraph 4, to acquire the controlling share

or shares in French Timken from the Lux Company it will be the majority and controlling shareholder of French Timken with the ensuing and attendant rights to exercise all of the powers vested in it as such, and if the Lux Company decides to sell its shares of French Timken, the defendant will have the right to become the owner of all of the stock of French Timken.

10. If the respective options above described are exercised by the defendant and as a consequence thereof, stock interests in British Timken and French Timken, respectively, are acquired as above set forth, it will follow that the defendant will be a majority stockholder of both British and French Timken, respectively, and possibly the sole owner of French Timken, instead of a minority stockholder in British Timken and an equal stockholder with Dewar in French Timken, as it was before Dewar died.

11. The exercise by the defendant of the options to acquire Dewar's former stock interest in British Timken and French Timken, respectively, and the resulting changed and additional stock interest of the defendant therein will necessarily raise and present for determination legal questions which have not heretofore been considered nor decided by this Court, in the light of the changed circumstances, including particularly the question of whether the defendant should be permitted to conduct its operations in the British Empire and Europe through British Timken and French Timken, as majority owned subsidiaries, or, instead, be required to divest itself of all interest in those companies, as presently decreed by this Court.

12. It is in the furtherance of justice, in view of the fact that Dewar has died since the perfecting of the appeal to the Supreme Court of the United States in this cause, and the further fact that the defendant intends and proposes to exercise the options granted to it to acquire additional stock interests in British Timken and French Timken, respectively, as above set forth, that the record in this case

be reopened by this Court for the purpose of permitting the defendant to introduce evidence of these facts and the new situation thereby created.

13. The taking of additional evidence in the respects above stated, will result in having the record in this cause disclose the facts as they now actually exist, and will thereby prevent unnecessary delay and prolixity in the final disposition of this cause both in this Court and on appeal in the Supreme Court of the United States.

14. It is no longer equitable, because of the occurrence of the death of Dewar and the perfection of the resulting rights in the defendant, all of which has occurred since the rendition of this Court's final judgment herein, that such final judgment should have prospective operation in certain respects, including particularly Section IV thereof which terminates, and restrains the defendant from further enforcing any of the provisions of the agreement dated March 22, 1948, between the defendant and Dewar which grants to the defendant the option to purchase Dewar's ordinary shares of stock in British Timken referred to in paragraph 3 hereof, and Section VIII thereof which requires the defendant to divest itself of all stock holdings and other financial interest, direct or indirect, in British Timken and French Timken, and enjoins it from acquiring any ownership interest in British Timken or French Timken by purchase or acquisition of assets or securities or through the exercise of any option, and from exercising any authority or control over the sale or other business policies of British Timken or French Timken.

15. This Court has jurisdiction to ask leave of the Supreme Court of the United States to consider the defendant's motion that this Court receive additional evidence in the respects above set forth, determine the legal questions presented by reason of the change of circumstances as to stock ownership and control of the defendant in British Timken and French Timken, respectively, and reconsider

its final judgment herein, and, if leave be granted, to proceed so to do, by virtue of the decisions and holdings of the Supreme Court of the United States in *Roemer v. Simon*, 91 U. S. 149 and *Realty Acceptance Corporation v. Montgomery*, 284 U. S. 547, 551.

WHEREFORE, The Timken Roller Bearing Company, defendant in this Court, appellant in the Supreme Court of the United States, respectfully moves this Court as follows:

1. That this Court make application to the Supreme Court of the United States for leave to consider the motion made by the defendant in the next succeeding paragraph hereof, and in connection therewith

(a) to receive evidence and insert it in the record in this cause;

(b) to consider such additional evidence and make its findings of fact and conclusions of law with respect thereto;

(c) to obtain, upon further application to the Supreme Court of the United States by this Court, a remittitur of all or so much of the record in this cause now filed in the Supreme Court of the United States as this Court may deem necessary to further consideration of this cause in the light of such additional evidence;

(d) to reconsider its final judgment herein and to relieve the defendant therefrom by vacation or modification thereof, if this Court shall deem such action just; and

(e) in the event that this Court shall not vacate its final judgment herein, to certify such proceedings had pursuant to this motion to the Supreme Court of the United States for inclusion as part of the record on appeal in that Court in this cause.

2. That this Court, upon receiving leave from the Supreme Court of the United States, proceed further in this cause:

(a) to receive and insert in the record in this cause evidence that Michael B. U. Dewar died at the age of 64 on December 21, 1950, after the appeal from this Court to the Supreme Court of the United States had been perfected;

(b) to receive and insert in the record in this cause evidence that the defendant proposes to exercise, as soon as may be practicable, its rights under the option agreements hereinbefore described and thereby to acquire 94,960 ordinary shares of the stock of British Timken, and shares carrying one vote in French Timken, or part or all of the shares of French Timken now owned by the Lux Company if the same shall be offered to the appellant;

(c) to receive and insert in the record in this cause any other evidence offered by the parties which the Court shall deem competent, relevant and material;

(d) to consider such new and additional evidence described in subparagraphs (a) through (c) of this paragraph 2, and determine the legal questions presented by the change of circumstances resulting from the death of Dewar and the exercise by the defendant of the options hereinbefore described, and make its findings of fact and conclusions of law with respect thereto;

(e) to reconsider its final judgment herein and to relieve the defendant therefrom by the vacation thereof, or, in the event that the Court shall not vacate the same, by modification thereof to eliminate the provisions of Sections IV and VIII thereof which adversely affect the rights of the defendant as specified in paragraph 14 hereof, or otherwise as may to the Court seem appropriate; and

(f) in the event that this Court shall not vacate its final judgment herein, to certify such proceedings

had pursuant to this motion to the Supreme Court of the United States for inclusion as part of the record on appeal in that Court in this cause.

LUTHER DAY,
1759 Union Commerce Building,
Cleveland, Ohio,
JOHN G. KETTERER,
First National Bank Building,
Canton, Ohio,
Attorneys for Defendant-Appellant, The Timken Roller Bearing Company.

Notice of Motion.

To Philip B. Perlman, Solicitor General of the United States,
Washington, D. C.

Robert B. Hummel, Chief,
Great Lakes Division,
Antitrust Division,
Department of Justice of the United States,
905 Public Square Building,
Cleveland, Ohio.

Please take notice that The Timken Roller Bearing Company, defendant in Civil Action No. 24,214 in the District Court of the United States for the Northern District of Ohio, Eastern Division, entitled *United States of America vs. The Timken Roller Bearing Company,* and appellant in said cause on appeal in case No. 352 on the docket of the Supreme Court of the United States, entitled *The Timken Roller Bearing Company vs. The United States of America,* has filed the foregoing motion in the above entitled case that the District Court of the United States for the Northern District of Ohio, Eastern Division, ask leave of the Supreme Court of the United States to consider defendant's

motion that the said Distfict Court receive additional evidence and reconsider its final judgment therein, and, if leave be granted, that the District Court proceed so to do, because of changed circumstances due to the death of Michael B. U. Dewar since the perfection of the appeal in said cause to the Supreme Court of the United States, and that the same will be on for hearing before the Honorable Emerich B. Freed, Judge of the District Court of the United States for the Northern District of Ohio, Eastern Division, Federal Building, Cleveland, Ohio, on the 5th day of February, 1951, at 10:00 o'clock, or as soon thereafter as such motion can be heard.

LUTHER DAY,
JOHN G. KETTERER,
Attorneys for Defendant-Appellant, The Timken Roller Bearing Company.

Service of Motion.

Copies of the foregoing motion, notice of motion, and statement of reasons in support thereof were served upon counsel for the plaintiff-appellee in the above entitled cause by depositing in the mail copies thereof addressed to Philip B. Perlman, Solicitor General of the United States, Washington, D. C., and Robert B. Hummel, Chief, Great Lakes Division, Antitrust Division, Department of Justice of the United States, 905 Public Square Building, Cleveland, Ohio, on this 24th day of January, 1951.

LUTHER DAY,
JOHN G. KETTERER,
Attorneys for Defendant-Appellant, The Timken Roller Bearing Company.

STATEMENT OF REASONS SUPPORTING MOTION.

The Court will remember that Dewar, the English businessman who purchased British Timken in 1927 and caused the organization of French Timken in 1928, at the joint instance of himself and defendant, figured very prominently in the evidence when this case was tried on the merits. Much of the evidence introduced by the defendant was for the purpose of proving that Dewar and it, ever since their entering into the Heads of Agreement of May 16, 1927, contemplating the purchase of British Timken and other matters of a broad general nature, had maintained and carried out an arrangement in the nature of a joint venture between them for the purpose of developing the manufacture and sale of tapered roller bearings in defined foreign territory, and that British Timken and French Timken were the instrumentalities through which the joint venture was conducted. One of the defendant's principal contentions was that Dewar and it could lawfully cause arrangements to be made between the foreign Timken companies and the defendant by which the latter, by reason of the joint venture, agreed not to compete with them and they, in turn, not to compete with the defendant.

On December 21, 1950 Dewar died, and it is quite obvious that his death radically changed all of the foregoing situation, and is a fact which, therefore, should appear in the record on appeal to the Supreme Court. This case can no longer be briefed or argued properly, upon the now existing state of facts, on the same basis as that which obtained in this Court before Dewar died.

Moreover, as the motion shows, one provision of the agreement pursuant to which the joint venture has been carried on, was that, upon Dewar's death, the defendant should have the right to acquire control of both British Timken and French Timken by the exercise of the options specifically described in our motion. That which was merely a remote possibility in this regard at the time of the

trial and disposition of this case in this Court has now become a fact. We believe that this Court may wish to reconsider particularly, as requested by the defendant, that portion of its judgment in which it decreed that the defendant should divest itself of all interest in British Timken and French Timken, respectively, and should acquire no further interest therein. After all, it is necessary and usual for American manufacturers to conduct their foreign operations in the principal European countries, including those composing the British Empire, through local subsidiaries, either wholly or partly owned, and this Court may desire to consider whether or not it should afford to the defendant that privilege now that it is potentially the majority owner of both British Timken and French Timken. This was done in *United States v. National Lead Company*, 63 F. S. 513 (S. D. N. Y., 1945) aff'd. *United States v. National Lead Co.*, 332 U. S. 319, in which the court gave National Lead Company the option of either disposing of its stock in certain foreign corporations jointly owned by it and its adjudged co-conspirators, or acquiring the stock of the latter therein.

In any event, it would be in the interest of justice to enable the defendant to insert in the record the facts as to Dewar's death, the exercise of the options by it, and any other competent, relevant and material evidence bearing on this question which this Court might see fit to receive, for the purpose of enabling the Supreme Court on appeal to determine the nature of the relief which should be granted to the plaintiff, assuming that the judgment of this Court on the merits of the case is affirmed.

This motion, of course, is unusual in nature, in that we are asking that the District Court take action in a case which is pending on appeal in the Supreme Court. However, an extended examination of the authorities has revealed that this procedure is authorized and approved by the Supreme Court under circumstances of the nature here present.

In *Roemer v. Simon*, 91 U. S. 149, the appellant presented in the Supreme Court a petition supported by affidavits, stating, in substance, that material evidence previously unknown to him had been discovered since perfection of his appeal from a decree dismissing his bill for an injunction and an accounting resulting from alleged patent infringement. He moved that leave be granted him to give to the appellees the requisite notice of a further motion for a rule requiring them to show cause why the Supreme Court should not remit the record to the Court below for a rehearing of the case. The Supreme Court denied the motion stating (p. 150):

> "It is clear that, after an appeal in equity to this Court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. *We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here.*[1] Rev. Stat. § 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule 88. It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. *If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause.* Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. *The court below alone can make the request to us. The application of the parties must be addressed to that court, and not to us.*"

In *Realty Acceptance Corporation v. Montgomery*, 284 U. S. 547, the Supreme Court reaffirmed its position that the action must be initiated in the first instance in the District Court. In that case, the Circuit Court of Appeals af-

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[1] Emphasis throughout is supplied unless otherwise indicated.

firmed a judgment of the District Court against the defendant for breach of a contract of employment after the expiration of the term in which the District Court had entered judgment against the defendant. After the affirmance, the appellant filed a motion for a rehearing and, before disposition thereof, presented to the appellate court a petition alleging that at the trial the plaintiff had failed to disclose certain earnings of which he had been in receipt which should have been taken into account in mitigation of damages, and that these facts had been discovered only after the perfection of the appeal. The petition prayed that the mandate of the Court of Appeals be stayed to afford the District Court opportunity, if it thought proper, to request the return of the record so that the judgment could be opened and that, if justice should so require, a new trial be granted on the issue of the amount of damages. This petition was granted and the District Court, on application of the appellant, requested the Court of Appeals to return the record, whereupon the latter court vacated its judgment affirming that of the District Court and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, found the evidence newly discovered, set aside the judgment, and granted a new trial. On appeal, the Court of Appeals held that it should not have taken the action which it did, and reinstated the order affirming the original order of the District Court. The Supreme Court, on appeal, held that 28 U. S. C. A. § 876, which defined the appellate jurisdiction of the Court of Appeals as well as that of the Supreme Court, did not grant jurisdiction to the appellate courts to take action to reverse or modify their judgments where no error appeared in the record justifying modification or reversal, merely for the pupose of enabling the lower court to receive newly discovered evidence. The Court referred to *Roemer v. Simon*, 91 U. S. 149, *supra*, as supporting this proposition, and also the proposition that

"if the term had not expired the appellate court might in a proper case, upon request of the court below, return the record, for the opening of the decree and for rehearing" (p. 551). The Supreme Court also held that by rescinding its affirmance of the judgment and dismissing the appeal, the Circuit Court of Appeals ended the case in that court, and deprived itself of all power to add to or alter the record as certified, and "Since there was no case pending power was wanting to make any power granting leave to the court below for any purpose. The attempt by remanding the record with leave to the court below to take action *which would otherwise have been beyond its power* left the matter precisely as if no such order had been made." (p. 552.)

That under the present rule this Court does have power to act as requested by the defendant is shown by our discussion of Rule 60(b) and 6(c), Rules of Civil Procedure, later herein, so that an order of the Supreme Court permitting this Court to act would not be contrary to the decisions in the above cases.

This method of procedure has been recognized as appropriate in *Chisholm-Ryder Company v. Buck*, 65 F. (2d) 735 (C. C. A. 4, 1933), in which the complainant in a patent infringement case on appeal presented to the Appellate Court a motion to receive and consider as a part of the record a certain patent, and the court held it had no jurisdiction to take further proof or to set aside a judgment of the District Court for that purpose, if no error appeared in the record, following *Realty Acceptance Corporation v. Montgomery*, 284 U. S. 547, *supra;* and *In Re Robertshaw*, 75 F. (2d) 203 (Court of Customs and Patent Appeals, 1935), in which the court denied a motion to remand which was joined in by the Commissioner of Patents, in order to enable the patent office to declare an interference between two applications for patents which should have been declared but was not, and to enable the Commissioner of Patents to take proper action, on the ground that application should have been made to the patent office alone to send

to the Court of Appeals a request for return of the record in accordance with the practice laid down in *Roemer v. Simon*, 91 U. S. 149, *supra*; and in *Hall v. United States*, 78 F. (2d) 168 (C. C. A. 10, 1935).

The Court will observe that the motion in the case at bar does not ask that this Court seek to obtain a return of the record from the Supreme Court unless, and until, this Court shall determine whether it is necessary to consider the record, in whole or in part, to determine what action to take in connection with this supplemental proceeding. The authority for this refinement of the rule laid down in *Roemer v. Simon*, 91 U. S. 149, *supra*, is found in *Baltimore S. S. Company v. Phillips*, 9 F. (2d) 902 (C. C. A. 2, 1925), in which the District Court, on motion of the plaintiff therein, and after the appellant had appealed from an adverse judgment, requested the Circuit Court of Appeals to remit the record in connection with a motion in the District Court by the appellant for reargument of the case. The record was remitted and the District Court vacated its judgment and set the cause down for trial. Appealing to the Court of Appeals from a judgment for the plaintiff, the defendant contended that the District Court had no jurisdiction to vacate the judgment of dismissal of the complaint. The Court, after referring to *Roemer v. Simon*, *supra*, as stating the proper practice, said (p. 903):

> "Of course, the appellant may always move to dismiss his appeal (Greene v. United, etc., Co., 124 F. 961, 60 C. C. A. 93 (C. C. A. 1)), and no request is necessary for that purpose. But in so doing he risks all on his cast in the District Court, for it may be too late after decision for a new appeal. Similarly, if on the appellant's motion the District Court asks for a remittitur before deciding the motion, as was apparently the case in Mossberg v. Nutter, 124 F. 966, 60 C. C. A. 98 (C. C. A. 1), and as the District Court did in the case at bar. *The safest way is for the District Court, if disposed to entertain the motion at all, to ask leave of this court to do so. If this is given, it may proceed, the appeal*

> *still pending. Should it decide to reopen, it may then request remittitur; and the appellant will have risked nothing.* This was the course approved by the Circuit Court of Appeals for the Sixth Circuit in Meccano v. Wagner (C. C. A.) 235 F. 890, and we also approve it. Sundh Elec. Co. v. Cutler-Hammer Mfg. Co., 244 F. 163, 170, 171, 156 C. C. A. 591."

See also *Thomas & Betts v. Electrical Fitting Corporation,* 25 Fed. Supp. 173 (D. C. S. D. N. Y. 1938), and *United States v. Newbury Manufacturing Company,* 123 F. (2d) 453 (C. C. A. 1, 1941).

Authority for the retention of the appeal by the Appellate Court while this Court is considering additional evidence is found in *Jensen v. New York Life Insurance Company,* 50 F. (2d) (C. C. A. 8, 1931), 59 F. (2d) 957. In that case the insurance company sued in the Federal District Court to cancel a policy, and Jensen plead in abatement that an action involving the same issue,—as to whether the insurance ever took effect,—was pending in a State Court, and had been decided in favor of Jensen, and was pending on appeal in the State Supreme Court. The plea in abatement was overruled, and the Federal Court decided the case in favor of the insurance company. On appeal, it was made known to the Federal Circuit Court of Appeals that the decision in favor of Jensen in the State Court had been affirmed by the State Supreme Court. The Circuit Court of Appeals decided that it was important that this fact should be in the record in order to enable it to determine properly the question of the effect of the judgment in the State Supreme Court, which, of course, was contrary to that of the Federal District Court. The Court stated that it might (1) affirm the decree without prejudice to an original suit by the plaintiff to set aside the decree in Federal Court because of the final judgment in the State Court; (2) reverse the decree and remand the cause to the District Court for further pleadings and proceedings; or (3) "follow one of the different methods of

procedure shown in" various decisions "following an expression in *Roemer v. Simon*" (p. 515). The court then stated (p. 515):

> "Still another course is open: To retain the present appeal in this court, but remand the cause to the trial court and grant leave to Jensen to apply to that court to reopen the case for the filing of a supplemental pleading and the introduction of evidence on the issue as to the effect of the judgment in the state court.
>
> "The cause can again be brought to this court on appeal from the later decree entered on the supplemental issue, and this court can then determine the whole cause, whether based upon the original or the later decree. Such a course has obvious advantages. It disposes of the whole cause in one suit; and it does away with the necessity of retrying, in the District Court, issues already adjudicated by a decree. It obviates the necessity of passing upon the question of the merits of the suit at this time, a question which may possibly not be necessary for this court to pass upon at all."

The Court then referred to certain other decisions in which somewhat similar procedure had been adopted, and then stated (p. 515):

> "We think the procedure last above outlined as approved by this court should be followed in the case at bar; especially so, as the matters which it is sought to bring to the attention of the court have occurred subsequent to the taking of the present appeal.
>
> "An order will, accordingly, be entered that leave is hereby granted to appellants, defendants below, to make a motion to the United States District Court below to open the case and allow reframing of the pleadings so as to present the issue of the existence of the alleged final judgment in the state court, and the effect thereof upon the suit in the federal court; and leave is hereby granted to said United States District Court to hear, consider, and decide such motion; and if, upon consideration of the evidence and the arguments of the respective parties on that motion, said United

States District Court decides to grant said motion, then thereafter to admit such competent and relevant evidence as any of the parties to this suit may present relative to the existence of the alleged final judgment in the state court, and the effect thereof upon the present cause in the federal court; and thereafter to consider and determine the case upon the record thereof thus supplemented. Meanwhile, the present appeal will remain in this court."

The case was retried, and before it was decided on the second appeal the Supreme Court of the United States decided the cause of *Realty Acceptance Corporation v. Montgomery*, 284 U. S. 547, *supra*. In the *Jensen* case on the second appeal, *Jensen v. New York Life Insurance Company*, 59 F. (2d) 957, the court pointed out that when it remanded the case, as previously outlined, the term of court in which the District Court had entered its decree had ended, and held that, in view of the Supreme Court's decision in *Realty Acceptance Corporation v. Montgomery, supra*, it had exceeded its jurisdiction because "the district court was without power to grant a rehearing after the term in which the decree was entered" and "this court was without authority to grant a remand for that purpose" (p. 960).

However, it would seem that the *Jensen* case is still authority for retention by the Appellate Court of the appeal pending original application in the District Court for relief pursuant to the procedure outlined in *Roemer v. Simon, supra*. Somewhat similar procedure was adopted in *Levinson v. United States*, 32 F. (2d) 449 (C. C. A. 6, 1929), in which the Circuit Court of Appeals, on motion to remand the appeal in order to permit the appellant, who was convicted of a crime, to file a motion for a new trial in the District Court on the ground of evidence of misconduct in connection with the trial, discovered shortly after the appeal was taken, instead retained the appeal, extending the time for making return to the appeal and permitting

the motion for a new trial to be heard by the District Court. The Court said (p. 450):

> "For the reasons stated, we think the motion should be heard on its merits, but we see no occasion for suspending the appellate proceedings except to direct that the time for making return to the appeal be extended until the 1st of June. We assume that the motion will be heard without delay. If granted, and that event is certified to us, the appeal will be dismissed; if denied and appellant conceives that the denial is legally erroneous because beyond the court's discretion, he may include such matter in the return, with amended allegations of error thereon.
>
> "Of course we intimate no opinion as to whether the motion should be granted; we only permit it to be entertained by the trial court as if the appeal had not been made. Upon such motion, the trial court will consider only these two new grounds. As to all the others, appellant, by appealing, deliberately waived his right to make the motion."

It is to be observed that the difficulty which prevented the courts in *Roemer v. Simon*, *Realty Acceptance Corporation v. Montgomery*, and *Jensen v. New York Life Insurance Co.*, *supra*, from taking any action at all, namely, that the term of the District Court at which the judgment had been entered had expired, does not exist in the case at bar. Rule 60(b) of the Federal Rules of Civil Procedure provides in material part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or dis-

charged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.* The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

The emphasized language indicates the portion of the rule which confers power upon this Court to reconsider its final judgment. It is stated in the comments of the rules committed with respect to these portions of Section 60(b):

"* * * Clause (5) further permits relief on the basis that '*it is no longer equitable that the judgment should have prospective application.*' The chief application of this provision will be to a permanent injunction, which, while proper when entered, has become of no use or benefit to the one whose rights were protected, *or where it would be inequitable to continue it, because of the occurrence of facts and conditions since its rendition,* and the decree should accordingly be modified or vacated. Moore and Rogers, Federal Relief from Civil Judgments (1946) 55 Yale J. L. 623, 643."

"Clause (6), which is also new, is likewise not subject to any definite time limit, and is a statement of residual power in the court. Since the intendment of Rule 60(b) is that the rule be inclusive, some statement of residual power was necessary."

Moreover, the ending of the term in which the final judgment in the case at bar was entered does not affect the defendant's right to seek reconsideration of the Court's final judgment pursuant to Rule 60(b), for Rule 6(c) provides as follows:

"The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration

of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

In conclusion, for the reasons stated, we submit that the foregoing motions should be granted.

Respectfully submitted,

LUTHER DAY,
JOHN G. KETTERER,

Attorneys for Defendant-Appellant,
The Timken Roller Bearing Company.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

No. .....

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE TIMKEN ROLLER BEARING COMPANY,
Defendant.

FREED, *J.*—Wednesday, Feb. 14, 1951.

The Court: I want to say to you gentlemen this. I think all of you undoubtedly know what the situation as to the work has been in this court. We have finally reached a point where a judge will be here and we at least see daylight. Now, I can not hope to take this matter up before I dispose of numerous other matters that have been submitted to me before. The only reason I mention that is because it was indicated by Mr. Epes that this matter is about to be set for hearing in the Supreme Court.

As much as I would like to do it, I think other litigants are entitled to have their matters decided in the order in which they were presented. I am in a position where I have so many submissions that it will take me at least three or four weeks before I can get out from under those. I do want you to know that I can not see my way clear to give this one the green light and make those other litigants wait their turn, particularly in view of the fact that this was filed subsequent to those other matters. If it should interfere with the hearing in the Supreme Court I think some arrangement should be made between you to permit this court to consider this motion.

I do want you to know that. I don't know what your desires are. I don't know how important it is to either side to have the matter immediately heard, but it will take me at least thirty days or more to get to this matter. I want you to know, I can't avoid it. It is something that I can't help.

Mr. Ketterer: Well, I don't think that is going to raise any particular problem, your Honor. I mean if that matter is brought to the attention of the Supreme Court I am quite sure they won't raise any problem on that point.

The Court: Is the Government going to object to making some arrangement with the clerk of the Supreme Court on the matter of the hearing of this case?

Mr. Epes: Of course, your Honor, the Government has been anxious to have this case heard in the Supreme Court this term.

The Court: I understood that. That's the only reason I mentioned it to you.

Mr. Epes: Yes.

The Court: But, at the same time, I don't ever want to pass on any matter, gentlemen, unless I give it careful consideration. I don't want to pass on this matter from the bench. You have searched the law, you have devoted a lot of time to it, you have seen fit to file briefs consisting of 20 some pages for each side; the Timken Roller Bearing Company's counsel wish to file a reply brief. I think this Court would be derelict in its duty if it passed on the matter without examining it. I want to examine your briefs and be given an opportunity to study it. I can't pass on it so as to expedite the matter that you want heard. If you think it is that important, I don't know what I can do about it.

Mr. Epes: Well, what is your Honor's suggestion as to the—

The Court: I haven't any. I'm leaving it entirely in your hands, in counsel's hands. All I can say to you is what I have already indicated. I didn't create this situa-

tion of having a court of two judges attempting to carry on the work of this entire district, it wasn't my doing. I think the litigants who have filed briefs and have presented matters to me two or three months ago are entitled to have their cases decided, and I don't think I have any right to say to them, "You wait until I decide the Timken case." I can't do that, and I don't think it is a fair way of disposing of these cases.

Mr. Epes: Your Honor, I appreciate your position entirely and, as I understand what you are saying, you will possibly not get to this for thirty days.

The Court: That's right.

Mr. Epes: And you feel you must read the twenty-page briefs that each side has filed.

The Court: I am not just going to read the briefs, but I want to see the cases.

Mr. Epes: In other words, it will be a number of weeks before we can expect a decision from your Honor?

The Court: Yes. I want you to know that very definitely, because I think it would be unfair to both sides if I didn't tell you.

Mr. Epes: Well, I think possibly, since that is the fact, and I think your Honor is absolutely correct in taking that position, possibly the best thing is for counsel to discuss what we will do in the Supreme Court.

The Court: That's up to you gentlemen.

Mr. Epes: We have got your Honor's position and I think possibly, if we have to do it, we can reach some conclusion.

Certificate.

I, A. V. Jarvela, Official Court Reporter for the United States District Court, Eastern Division, Northern District of Ohio, do hereby certify that the above and foregoing is a true and accurate transcript.

A. V. JARVELA,

Official Court Reporter.